90-835

Supreme Court, U.S.
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OCT 9 1990
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No. _____

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I N THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

_____

HARRIET SMITH, et al. ADMINISTRATRIX OF THE ESTATE OF WILLETTE LEONARD SMITH, DECEASED,

Petitioner,

v.

CITY OF BERKELEY, et al, CECIL BURGESS,

Respondents

_____

PETITION FOR A WRIT OF CERTIORARI
To The Court of Appeal of the State of California
For the First Appellate District, Division Four

_____

Ms. Harriet Smith
1945 Milvia Street
Berkeley, CA 94704
1-415-848-0994
Representing Herself, In Pro Se

October 9, 1990

QUESTIONS PRESENTED

1. **Whether or not resident home owners,** beneficiaries of Federal Comprehensive Demonstration Cities Programs governed by the Housing and Community Development Act.

seek remedies and relief in tort, when their position of a joint escrow contract agreement through deceit, is conspired embezzled, fraudulently appropriated to the fiduciary agents own personal use,

while at the same time, and subsequently agent induces justiciable reliance by contractual fraud to the detriment of resident home owners

in administering and supervising the federal program as fiduciary for both principals, the resident home owners and the federal

government, under the direction of the Department of Housing and Urban Development,
entrusted with the care of resident home owners real and personal property, involving real estate construction projects, over $10,000.00, and temporary relocation contract agreements with third parties, as a matter of law.

2. When agents fail to either complete the project, 'making principals whole,' or fail to order the trustee to repudiate the relationship, what determines the event and statute to set the time and limits to determine claimant's right to relief against tortfeasor.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Harriet Smith, Second Beneficiary, Administratrix of the Estate of Willette Leonard Smith, and Trustor in Succession; respondents, City of Berkeley, et al.; Cecil Burgess, Rayce Mason, employees and as individuals; Henderson Construction Company; Oliver Henderson, individual; and Roche Construction Company, Ozzo Marrow, individual.

The judgment sought to be reviewed was rendered by the Court of Appeal In and For the State of California, First Appellate District, Division Four.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HARRIET SMITH, et al., Petitioner

v.

CITY OF BERKELEY, et al.,

and CECIL BURGESS, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE FIRST APPELLATE DISTRICT, DIVISION 4:

The petitioner, Harriet Smith, et al., respectfully prays that a writ of certiorari issue to review the Federal Questions in the proper jurisdiction; any order during the case that substantially affects the rights of the aggrieved party, and the judgment and opinion of the Court of Appeal, entered in the above-entitled cause on April 3, 1990.

OPINION BELOW

The memorandum decision of the Court of Appeals for the First Appellate District for the State of California (Poche', J., Anderson, P.J., Perley, J) has not been reported and is unpublished. It is entitled, **Harriet Smith,** et al, **v. City of Berkeley,** et al. Case No. AO40563, (C. A. Calif. April 3, 1990). The Opinion is reprinted in the appendix to this case, hereto as Appendix A, Page 31; Oral Hearing Notice, Appendix B, Page 45.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C.A., Section 5301, of the Congressional Act: **Housing and Community Development,** P.L. 93-383, Title 1. August 22, 1974, and the **Demonstration Cities Metropolitan Development Act**, P.L. 89-754, November 3, 1966. Petitioner raised the federal questions

for the first time in the Supreme Court of California. The state Supreme Court refused to address the federal questions, and failed to review the assigned errors.

On July 10, 1990, the state high court issued an order denying review after judgment by the Court of Appeal, and on August 10, 1990, the Clerk of the Court certified the decision entered in the above-entitled cause on April 3, 1990. No appearance was sought for oral hearing, however, a Petition for Rehearing was filed April 19, 1990, and denied April 24, 1990. The unpublished orders are reprinted in the Appendix, affirming the Superior Court's presumptively valid misapplied dismissal contending that Petitioner's complaint was filed in violation of the **California Government Tort Claims Act,** section 911.2, June 23, 1981, out of time.

The jurisdiction of this Court to review the federal question presented to and rejected

by the state Supreme Court and the Court of Appeals of California is invoked under 42 U.S.C.A. 5301, **Housing and Community Development Act,** Pub. L. 93-383, August 22, 1974.

STATUTE INVOLVED

Title 1, of the **Housing and Community Development Act** of 1974, consolidates community development program administered by the Secretary of the Department of Housing and Urban Development, and replaces them with a new program of block grants for community development, beginning January 1, 1975. . . . to complete five action years at the prior average annual level of model neighborhood funding, plus a declining percentage of this amount for a subsequent three (3) year period. **U.S. Department of Housing and Urban Development**, Justification for 1973 Estimates: Community Development, prepared for House of Representatives Committee on

Appropriations (February 1972), pp. B-10 to B-13.

STATEMENT OF THE CASE

The case arises from a breach of duty, wherein the fiduciary agent misrepresented its principal with third parties, and failed to complete a "temporary" relocation contract agreement and a real estate construction project under an escrow contract agreement with the trustor and second beneficiary who subsequently became trustor in succession.

Mrs. Smith, a widow of 71 years, and a resident home owner was induced into the Comprehensive Cities Demonstration Program, December 9, 1974, by a federal grant that provided fiat money for the City Agent's to contract construction contractors to renovation her mortgage free property in which she had lived independently, enjoying the pleasures of a family residence for 29 years.

The City Agents, entrusted with the care of resident home owners real and personal property, involving real estate construction projects, over $15,000.00, and temporary relocation contract agreements with third parties, as a matter of law, mismanaged the project, and fraudulently misrepresented its principal with third parties, which resulted in the destruction and loss of her home.

On or about November 26, 1977, and March 28, 1979, Petitioner filed claim letters in principal's behalf. The claim letters were filed in substantial compliance with the **California Government Tort Claims Act** Government Code 910, subsections (a) through (e)., and 911.2.

The respondents waived any defect in claims by not giving notice of insufficiency, as required by **Government Code,** 910.8.

The principal/trustor did not survive

this gruelling ordeal and died intestate, December 5, 1977.

A Redevelopment Relocation Specialist assigned to assist its principal, in May 1975 continued to work diligently with the trustor in succession until October 1980. The Redevelopment Relocation Specialist made clear expressed and implied promises, that its principals would be "temporarily" relocated, while the construction was underway, and all expenses would be paid by the Redevelopment Agency until its principals were returned to 'Improved living conditions."

The program was fraught with difficulties. Many errors were made by the respondents through conspiring to defraud, deceit, theft and misrepresentation of its principals. The City Agents negligently administered the supervision of the project, after it got started, and negligently selected construction contractors. Timely claim letters

were submitted to the public entity notifying it of the escrow problems, June 30, 1976, July 28, 1976, November 26, 1977, and March 28, 1979, without the need to litigate the claim.

Subsequently, however, Ms. Smith sought expert legal advice. A contingency contract with a retainer was established by November 3, 1980. During the discovery process, the events culminating in constructive fraud, and tortious breach of fiduciary duty were manifested until June 1, 1981.

Petitioner brought the lawyer the original complaint filed July 24, 1979. A second complaint was filed June 23, 1981, rather than amending the original complaint as instructed by the trustor in succession.. The complaint alleging constructive fraud, tortious breach of fiduciary duty, was based on the theory that the Agent had a duty and responsibility to provide replacement housing,

and complete the project by 'making its principals whole."

The Agents' counsel instructed Petitioner's lawyer to file a claim notice in strict compliance with the California Government Tort Claim Act. The claim notice was filed September 17, 1981. The Agent's counsel immediately denied the claim, October 1, 1981.

The complaint was demurred for failure to file a claim notice with the public entity before filing a complaint.

The respondent motion on this very issue was denied, July 15, 1986. However, in a bifurcated hearing without the essential witness present to check on her attorney, perjured testimony by the respondent misled the court, and the action was dismissed on misapplied legal principles, and the decision has been affirmed in state Supreme Court.

Reasons for Granting the Writ:

Petitioner calls for the exercise of this Court's power of supervision for an important federal question. On June 4, 1990, the appeal raised for the first time, in the state Supreme Court the question of whether or not this is the appropriate action for the relief sought from the public entity.

Without federal authorization, the Supreme Court of California has denied Petitioner the expectations of the **congressional acts**, and **constitutional rights guaranteed by the Fifth and Seventh and Fourteenth Amendments,** and has given itself discretionary jurisdiction to ignore federal questions that may be nonfinal and fall within an exception to the final-judgment rule or appended to a reviewable final decision. Such a drastic departure is in direct conflict with the intent of congress for

bringing forth this legislation and deserves this Court's attention

IMPORTANT QUESTION OF FEDERAL LAW

The issue before this Court is an important question of federal law relating to resident home owners seeking relief from negligent tortfeasors in privity, administering federally funded **Housing and Community Development Programs**, under the Law of Agency as fiduciaries who fraudulently misrepresented its principals with third parties, denied the claim as untimely at the time it was in dominion of a joint escrow, wherein, the trustee had not been ordered to repudiate the relationship.

In its discretionary function the manner the state Supreme Court has decided whether or not the claim has merit, may conflict with applicable decisions of this Court.

In relation to the assignment of errors the high state court refused to review the

assigned errors, expressly permitted in connection with the appeal of the judgement, **California Code of Civil Procedure**, section 906. The assignment of errors was included in the Declaration with the Petition for Rehearing, April 19, 1990. In so doing the state high court has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a Superior Court, as to compel Petitioner to call for an exercise of this Court's power of supervision.

> It has been held that dismissal without hearing on the merits in a suit for damages, wherein defendant's. . . sought to build case with falsified evidence and attempted to cover up such falsification **violated due process**, since the underlying circumstances were not of plaintiff's (Petitioner's) own creation. Court can always set aside decision that was obtained from it by fraud. **Cord v. Smith** (1970) 370 F. 2d 418. . . .

right to have a hearing includes right to be heard on one's own behalf, or to be heard through counsel; choice rests with party

U.S.C.A. Constitution Amendment 14, Carr v. Pena, (1977) 432 F. Supp. 828. . . . meant to protect persons from . . unjustified deprivation of property. **Carey v. Piphus**, 98 S.St. 1042; 438 U.S. 247, 55 L. Ed. 2d 252.

California Court of Appeal (1976). . state may place formal and procedural requisites on litigants without violating their constitutional rights to judicial process as long as state's action is based upon proper consideration of nature of proceedings and interest involved. **U.S.C.A. Constitution Amendment 14. Caesar v. Mountanos,** 542 F. 2d 1064, certiorari denied 97 S. Ct. 1498, 430 U.S. 954, 51 L. Ed. 2d 804.

The principal beneficiaries of **4 2 U.S..C.A. section 5301,** were persons of low and moderate income, however, the purpose of

this chapter is to improve the quality of urban environments for all residents. **Lower Moreland Homeowner's Association v. Department of Housing and Urban Development** District Court Pa. (1979) 479 F. Supp. 886.

The fact that the essential witness with an affirmative showing of good cause was excusably absence the month of April 1987, and unavailable the day of the trial was not cause for dictating a different result during the bifurcated trial.

The Court of Appeal in some way "blames' the Petitioner, the essential witness, denied a continuance, set aside or motion to vacate the judgment, for the lack of due diligence of the lawyers, and the abuse of discretion of the Superior Court. Petitioner knows now she pursued the wrong argument and petitioned the Court of Appeal to review the order affecting

the aggrieved party in a damage claim, and equity over $10,000.

> It is noteworthy, that "before the 1930's the most anti-Semic German was unaware that Germany had a "Jewish-problem." It took the Nazis to name the simple existence of Jews in the Third Reich as a "social problem," and that act of definition helped to shape the final solution. In the United States it has removed 'immigration' from its list of social problems, and has added 'urbanization.' Ryan, William **Blaming the Victim,** Pages 12, 13.
>
> **In District Court, Pa. (1977)** . . . counsel for the parties have the same obligation as does a judge to be reasonably prepared at trial to deal with foreseeable legal issues. **Smith v. Danyo**, 441 F. Supp. 171, affirmed 585 F. 2d 83.

The Comprehensive Cities Demonstration Agency, Administered by the City of Berkeley established an Agency Relationship, as a matter of law. According to the **law of**

agency in the **California Code of Practices and Procedure**: Section 38 (12 (a)-12(c).

> "An enforceable contract of agency is shown whereby agent has the power to alter legal relations between the principal and third parties. . . the agent is a fiduciary regarding matters within the scope of the agency; and the principal has the right to control the conduct of the agent as to matters entrusted to him or her."

Respondent's proposal accepted by the Department of Housing and Urban Development (HUD), and resident home-owners, established an agency relationship as a matter of law. Respondent used the federal fiat money to induce resident home-owners into the Comprehensive Cities Demonstration Program for the purpose of developing a Model Neighborhood that other Metropolitan Cities in the nation could use as an example to cure urban blight. In the Federal designated area,

Geographical Area 9, South Berkeley, California, the emphasis was on revitalizing the neighborhood, and providing jobs, income, and education.

The Court of Appeal and the Superior Court reflect at least three misunderstandings about the policy and purpose of the governing statutes, and the exceptions thereon.

1. In the enactment of this legislation, surely Congress did not intend for the resident home owners to be held liable for the damage caused by the improprieties of a few government officials, nor be saddled with the burdens of litigation in the judicial system on civil procedural issues, without being heard herself on the merits of the investigated 'realistic' claim. The respondent has not been prejudiced in any way.

2. The issue is not whether one is liable of misrepresenting a program to the federal government, and to resident home owners, but

whether a resident home owner, induced into a federally funded program, as Petitioner and her mother were, must clearly allege such misrepresentation, which they did.

3. The essential fact to the claim is not that Petitions' house burned down, but that the respondents' did not intend to renovate, rebuild, or replace Petitioner's home or complete the project in the federal model neighborhood program.

The City Agents made repeated promises to find a way to rebuild or replace the home. Petitioner has been penalized for believing them. By October 1980, it became apparent that the City had lost all ability to secure funding to do the rebuilding, and was unwilling to finance the rebuilding with its own funds. The second complaint was filed, June 23, 1981.

Sufficiency of Compliance with Tort Act.

The Original Complaint No. 523623-50 was filed in behalf of Petitioner, July 24,

1979, by Mr. Elvoyce Hooper, Esq.in compliance with Government Code 910, and 910.8. (waiver of insufficiency by respondent), and is recorded in the Register of Action, in Alameda County Superior Court, verified October 4, 1990.

The second law firm was instructed to file an amended complaint but rather filed a second complaint, No. 546983-7, June 23, 1981. The claims were all filed within one-year of a last wrongful acts. The second complaint stating a cause of action, Constructive Fraud (Tortious Breach of Fiduciary Duty), was filed before presenting a claim notice in strict compliance to the public entity.

This Court should follow **Bahten and Savage,** as cited in **Bell v. Tri-City Hospital** (1987) 196 C.A. 3d 438, 443, 241 C.R. 796 with respect to stating a cause of

action in a complaint before presenting a claim notice to the public entity. Test: Id. 449.

On the second complaint, claimant failed to specify the discovery dates of the cause of action, and **defendant waived any defect in claim** founded on when the fraud was discovered. **Martinez v. Los Angeles County** (1978) 144 Cal. Rptr. 123 78 C.A. 3d 242.

The Deputy City Attorney was conscious of these fact on or before, June 1986, having secured this information directly from Mr. Elvoyce Hooper, personally.

The record, grossly inadequate, however will show on or about July 10, 1986, plaintiff's attorney's declaration supports these findings, and the respondent concurred. This is the very same issue that defeated respondent/defendants motion for Summary Judgment, July 15, 1986.

The respondents' tortfeasor has unilaterally decided what event determines

when the time starts to run to set the limits on the tort claim, abandoning the fact that the contract between the Contractor and the resident home owner was an enforceable agency agreement, and the Department of Housing and Urban Development had determined the duties and responsibilities of the parties, again in 1976, 1979, and 1980.

Perjury and False Testimony:

In the Reporters' Transcript April 14, 1987, at 5:10-20, when the respondents' counsel's misrepresented to the Superior Court the status of the action, apparently, in attempt to avoid proceeding to trial on the liability issue for tort claim, specific performance or equitable relief in civic action for fraud, the respondent testified "that the case was first filed June 1981, and on the face of the pleadings, there shows that there's a violation of the one-year statute." This was false and misleading.

District Court, California (1961: Relief from judgments may be granted upon showing of equitable grounds.

District Court Tennessee (1974). Court may set aside judgment where it appears that such is manifestly unconscionable. **Groves v.Witherspoon** 379 F. Supp. 52. (misconduct of counsel).

It was held in the **District Court, New York**, (1968), in **Interstate Investor, Inc. v. U.S.,** 287 F. Supp. 374, affirmed 89 S. Ct. 707, 393 U. S. 479, 21 L. Ed. 2d 687, that:

> False and misleading testimony given during the course of judicial proceeding, does not constitute fraud upon the court unless, it appears that court was so misled as to render a decision based on mistaken view of material facts, and this is equally true in administrative proceeding.

A long line of cases agree that fraud in preventing an adversary from presenting an

available defense in procuring judgment is the type which equity will relieve. Where fraud vitiates judgment. . . then it cannot stand. It is sufficient ground to justify relief from final judgment. In the **District Court**, (1962) under **California** law, **Hart v. Travelers Indem. Co.** 212 F. Supp. 694, reversed **Travelers Indem. Co.** v. **State Farm Mutual Automobile Insurance Company** 330 F. 2d 250.

If this is an issue in this action, the respondent knew or should have known the discovery date when Petitioner learned that the Agents' had allowed the house to become under insured, as well as the fact that the investigative agency, the **Dept. of HUD's,** legal determination (1979), of the duty and responsibilities of the respondent to 'make principal whole' was based on the discovery that respondent's agents had failed to protect itself and its principals.

These specific facts plainly impugnant the official record, and is unconscionable to improperly influence the court in its decision. **C.A. Illinois,** (1968) **Kenner v. C.I. R.** 387 F. 2d 689, certiorari denied 89 S. Ct. 121, 393 U. S. 841, 21 L. Ed. 2d 112, rehearing denied 89 S. Ct. 390, 393 U. S. 971, 21 L. Ed. 2d 386.

These are triable issues of fact sufficient to support respondent was more than just a money lender for its principals. Personal funds of a hard cash loan of $5,500. belonging to Petitioner as second beneficiary to the old escrow contract agreement 1975, to complete the rehabilitation is in a joint escrow account with alleged public funds from the federal government, and remain frozen under the sole control of the respondents, at this present time, with an enforceable contract of agency, and the joint escrow agreement on written contract.

Amen v. Merced County Title Company 58 Cal. 2d 528, 375 P. 2d 33 (1962), San Francisco.

> Thus, setting aside or vacating the judgment for fundamental errors such as fraud, would render the judgment void aba initio. **Arkansas Statutes,** section 34-1901 et seq. **Buckhannan v. Nash** 216 F. Supp. 843. **Court of Appeals, California (1966).**

BIFURCATED BENCH TRIAL WITHOUT THE ESSENTIAL WiTNESS PRESENT TO CHECK ON HER ATTORNEY.

The Court of Appeal and state Supreme Court affirming the decision of the Superior Court in a bifurcated hearing on one issue, separating the issue of timeliness from the issue of liability, wherein the respondent falsely alleged non- privity, and that the tort claim was time barred under **California Government Tort Claims Act**, 911,2, is not trial of the action itself. The court in those

proceedings has no more power than would a court handling the action itself to grant what amounts to summary judgment, so long as there are triable issues of fact concerning compliance with the claims requirements. **Ngo v. County of Los Angeles** (App. 2 Dist. (1988) 255 Cal. Rptr. 140, 207 Cal. App. 3d 946. (review denied).

In this instance case, a fatally non-specific 19 minute bench trial, granting the defendants motion to dismiss the case amounts to giving the public entity sovereign immunity for conspiring to defraud, for misrepresenting the federal government and for deceiving private citizens in induced relationships of a continuing fiduciary character of reliance.

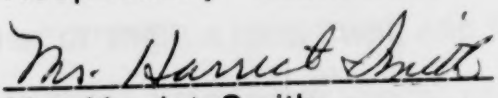
Federal cases hold that complexity of issues is not a ground for denial of a right to trial. In **federal court** it would entitle Petitioner to prove her case, not only through her testimony, through her deposition, through other

witnesses, with the essential witness present to exercise choice, but it would entitle her to due process of the law, and a right to empanel and be heard in a fair jury trial on the merits of the case. **Constitutional Amendment 7.**

In CONCLUSION, for these various reasons, this Petition for Writ of Certiorari should be granted. The subsequent questions are presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of the ultimate ruling of the Court of Appeal, upheld by the state Supreme Court that petitioner's complaint should be dismissed for failure to state a claim upon which relief can be given. Petitioners call for the exercise of this Court's power of supervision for this important federal question.

What was the intent of Congress.

Respectfully submitted,



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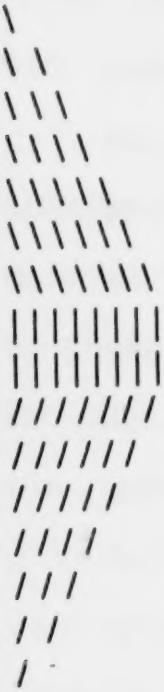

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

HARRIET SMITH, Plaintiff and Appellant,	SO15935 AO40563
v.	(Alameda Super. Ct.
CITY OF BERKELEY, et al., Defendants and Respondents.	No. 5469837

Plaintiff Harriet Smith appeals from the order denying her motion pursuant to Code of Civil Procedure section 473 to vacate the judgment dismissing her complaint against defendants.

Plaintiff's complaint was filed in June of 1981. By it plaintiff sought to recover for

events which transpired prior to January of 1978. No less than four times did defendants file a general demurrer to the complaint on the ground that plaintiff had failed to comply with the one-year statute of limitation for claims provision (Gov. Code. Section 911,1) of the Government Tort Claims Act. The second, third, and fourth of the demurrers were sustained, but leave to amend was granted. Plaintiff's fourth amended complaint was filed in October (15) 1983. Her at-issue memorandum was filed in October {31, } 1985.

In March (31) of 1987, the trial court granted defendant's request, pursuant to Code of Civil Procedure section 597, for a Bifurcated trial of the statute of limitations defense, which the court ordered :shall be tried before any other issue in the case." The following month (April 14, 1990), the court granted defendants' motion at trial for dismissal after defendants 'established a

prima facie case for the application of the statute of limitations" and plaintiff "introduced no evidence establishing any bar to the statute of limitations." Plaintiff did not appear at the trial. The judgment of dismissal was entered on May 6, 1987.

Plaintiff's motion to vacate the judgment was filed on July 2, 1987, and denied on October 14th of that year.

"A motion for relief under section 473, is addressed to the sound discretion of the trial court and an appellate court will not interfere unless there is a clear showing of an abuse. {Citation.}. . . {T}he moving party has the burden of showing good cause. {**Centurion Corp. v. Crocker National Bank** (1989) 208 Cal. App. 3d 1, 5). "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason." (**Shamblin v. Brattain** (1988) 44 Cal. 3d 474, 478.) Based upon the record of the showing made by plaintiff before

the trial court, we cannot hold that abuse is clearly demonstrated.

That record discloses that the reason plaintiff sought relief pursuant to section 473, was that she believed counsel for herself and defendants had executed a written stipulation for a continuance of the trial date for six months, i. e., {September 23, and October {16} of 1987, **plaintiff being unable to attend the scheduled trial because she was undergoing medical treatment.** The stipulation includes some unusual recitals, to wit:

'IT IS HEREBY STIPULATED AND AGREED between the parties as follows:

". . . That the trial . . . may commence on October 16, 1987,

". . . That defendants waive the five-year rule until that date but no later, having waived the rule three times previously.

". . . That it is defendants' position that because plaintiff Harriet Smith has previously sought delays in this litigation both for medical reasons {1} and because of her inability to find counsel to represent her; and because plaintiff has sought and obtained two previous continuances of the trial in this matter; that defendants will object strenuously to any further continuances in this case for any reasons whatsoever. . . . and if any such continuances are sought, defendants will move to dismiss the case."

The signatures for plaintiff's and defendants' counsel appear, but not for plaintiff or the court. Not only is there a designated place for plaintiff's signature, but that place appears immediately after this language: "I declare that I have read the above Stipulation and a copy thereof was provided me prior to its filing in Court and I approve the above Stipulation and affirm it was made for

my benefit and convenience." The stipulation form bears a handwritten notation by the trial court that the document was "lodged with court clerk this 14th day of April 1987" by plaintiff's attorney.

At the trial plaintiff's counsel informed the court: "On April 2nd. I had a telephone conversation with Mrs. Smith about the stipulation. She indicated to me that she was going to come to my office that afternoon between 3:00 and 6:00 p.m. for the purpose of signing the stipulation. I was in the office until 10:30 that night. I received no word from Mrs. Smith.

"The following day, April 3rd, I sent her a copy of the stipulation requesting her to sign it and . . . to meet no later than noon on the 6th of April.

"in the meantime, I got a mailgram from Ms. Smith indicating that she was away. . . She didn't indicate where she was, where she

would be. She left no number where she could be contacted, no address and no one whom I could contact. We called Ms. Smith continuously at her number in Berkeley without any response. We called her today to notify her of the trial . . . and still no response from Ms. Smith. . ."

Counsel for defendants then advised the court: "When we received the letter of Ms. Smith's mental condition, Mr. Moore (plaintiff's counsel) asked me for another continuance. The case had already been continued twice and I had cooperated . . . both times, at the insistence of plaintiff, even though it was past the five-year rule. I agreed to sign a stipulation only on the condition that Ms. Smith sign it as well, because the last time Mr. Moore and I stipulated for a continuance, she came into the court with her psychiatrist and said, "I never knew about it." I don't want that to

happen again. I signed the stipulation as a courtesy to Mr. Moore.

"I don't want anything in that stipulation to indicate that we're willing at this point with Ms. Smith's lack of cooperation, as I said, continuously throughout the course of this, to be construed as a willingness of the City of Berkeley to continue the case under these circumstances." 2.

In connection with her motion for relief, plaintiff attacked her trial counsel (who had mistaken belief that he needed the Plaintiff's signature on the document prior to filing it."

The remarks of counsel at the time of the trial indicate the utter spuriousness of plaintiff's position. Her signature was indeed required for the stipulation, counsel for defendants making it an express condition of their approval for a continuance. Absent plaintiff's signature, and the approval of the trial court, the document was a total nullity

and completely ineffective. Far from meriting her condemnation, plaintiff's trial counsel appears to have exerted Herculean efforts to serve his client's interests. Plaintiff told him she would sign the stipulation at his office, but then failed to appear at the time designated by her.

There is evidence from which the trial court could conclude that plaintiff intentionally lied to her counsel, and misled him on the eve of trial. (3). (footnotes included at the end of the document)

There is also evidence from which the trial court could conclude that plaintiff had made a practice of evading obligations she had assumed by initiating this litigation. (see note 2 and accompanying text, ante.) We believe that in light of these circumstances the trial treating plaintiff as willfully absenting herself at the time of trial, leaving her counsel, defendants and their counsel, and the

trial court in the lurch. Denial of the relief authorized by section 473, is wholly permissible in such circumstances. (see **Iott v. Franklin** (1988) 206 Cal. App. 3d 521, 531; **Nicholson v. Nicholson** (1948) 85 Cal. App. 2d 506, 509-510.) The "bounds of reason" were not exceeded. (See **Shamblin v. Brattain,** supra, 44 Cal. 3d 474 at p. 478.)

The order is affirmed.

Footnotes: Appendix A

1. The ostensible reason for plaintiff's inability to attend the scheduled trial date can be found in a letter from her psychiatrist advising the court that plaintiff "suffered a traumatic injury in 1984, which has caused a neurological condition that has caused an aphasic condition and more seriously a loss of balance. When she moves fast, she has a tendency to get dizzy and fall. She has fallen frequently with some of these falls causing serious consequences. . . . As a result she entered into a neurological treatment program to prevent further deterioration. This program is primarily based in Chicago, but also does include consultations in Egypt, Kenya and Ethiopia. . . . { }. . . Ms. Smith is scheduled to leave for Chicago on Wednesday, April 1, 1987, and her treatments will extend over a five month period of time. If these treatments are not successful, she will need to obtain

indigenous herbs in specific areas from traditional healers who follow her case in both Egypt and Ethiopia. The April 10th Court date would come after she has already started her next treatment cycle. This cycle will not be finished until the end of August 1987."

2. The substance of these remarks were repeated in a declaration submitted in opposition to plaintiff's motion.

3. According to her psychiatrist, plaintiff's {neurological) treatment was scheduled to commence April 1st in Chicago. (See note 1, ante.) This is partially confirmed by the mailgram which plaintiff's counsel advised the court at the time of trial he had received from his client' in her mailgram plaintiff stated that "my treatment cycle. . . began April 1, " These sources support an inference that plaintiff was already in Chicago

at the time she told her counsel that she would appear at his Oakland office.

End of Footnotes.

RE: **Court of Appeal** of the State of California, in and for the First Appellate District, Division Four, **April 3, 1990 Opinion.**

Poche', J.

WE CONCUR:

Anderson, P. J.

Perley, J.

APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR

Smith, Harriet
1945 Milvia Street
Berkeley, CA 94704

SMITH, HARRIET
vs.
CITY OF BERKELEY
AO40563
Alameda County No. 5469837

The above referenced case is now fully briefed and being prepared for decision. At this time the Court does not deem that oral argument would be useful in resolving the case. However, if any party desires oral argument, a written request for oral argument must (be) filed with the Clerk of the Court and a copy thereof served upon all interested parties within ten days of this notice.

IF ORAL ARGUMENT IS NOT REQUESTED WITHIN TEN DAYS, ORAL ARGUMENT WILL BE DEEMED WAIVED AND THE CASE WILL BE DECIDED WITHOUT IT.

If oral argument is requested by any party counsel will be subsequently notified of the time. No continuances will be permitted by stipulation of the parties. Any recent authorities which counsel intends to cite at oral argument must be served upon the Court and opposing counsel at least 5 days prior to argument.

Counsel are directed to immediately advise the Court if settlement is being pursued or if there is any other reason which could lead to early dismissal of the appeal.

If argument is requested, please be advised that this division employs the conference

system in deciding cases. Thus, before argument the panel will have studied the briefs, the record and the authorities. Counsel can best assist the Court by limiting argument to discussion of recent authorities on pertinent points of law.

Dated: March 19, 1990.

CARL WEST ANDERSON
Presiding Justice

The justices participating are:

__X_Anderson, P. J.,; __X_Poche, J. :
___ Channell, J. __X_Perley, J.

APPENDIX C

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
IN AND FOR
THE FIRST APPELLATE DISTRICT,
DIVISION: 4

SMITH, HARRIET
vs.
CITY OF BERKELEY
AO40563
Alameda County No. 546983-7

FILED
APR 24, 1990
Court of Appeal-
First App. Dist.
By_____
(Initials of) DEPUTY

BY THE COURT:

The petition for rehearing is denied.

Date: Apr 24, 1990 *Anderson, P.J.*
(Signature)

APPENDIX D:

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Four, No. AO40563
SO15935
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

HARRIET SMITH, Appellant

v.

CITY OF BERKELEY, Et Al., Respondents

Appellant's petition for review DENIED.

Supreme Court
FILED
JUL 10, 1990
Robert Wandruff, Clerk
DEPUTY

(Signature) *Lucus*
Chief Justice

APPENDIX E:

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION FOUR

Smith Harriet
1945 MILVIA ST.
Berkeley, CA 94704

SUPREME COURT
FILED
JUL 10, 1990
Robert Woodruff, Clerk
DEPUTY

SMITH, HARRIET
vs.
CITY OF BERKELEY
AO40563
Alameda County No. 546983-7

* * REMITTITUR * *

I, RON D. BARROW, Clerk of the Court of appeal of the State of California, for the First Appellate District, do hereby certify that the decision entered in the above-entitled cause on April 3, 1990, has no become final..

___Appellant _X_Respondent to recover costs.
___Each party to bear own costs.
___Costs are not awarded in this proceeding
___See decision for costs determination

Witness my hand and the seal of the Court
affixed at my office this August 10, 1990

RON D. BARROW, Clerk
By: C. Hoo, Deputy.